IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 6.02.2002
CORAM:
THE HONOURABLE MR. JUSTICE K. SAMPATH
SECOND APPEAL No. 1820 of 1989

Sabariaradimai .. Appellant

Vs..

Maria Retnam .. Respondent

! For Appellant .. Mr. K.V.Subramanian
^ For Respondent .. Mr. T.R.Rajaraman

The second appeal is filed against the Judgment and Decree, dt. 28.2.1989, made in A.S.No. 101/1984, by the Sub-Judge, Padmanabhapuram.
: J U D G M E N T

The substantial questions of law raised in the second appeal are: "1. Whether the decree and judgment of the Court below are to be set aside for non-consideration of document produced on the side of the appellant viz., Ex.B.19 etc. and non-consideration of the Commissioner's evidence and report, and plan marked in the present suit and for relying upon the Commissioner's report rendered in a different suit which do not have a binding effect on the defendant-appellant? 2. When there is a boundary dispute, whether the Courts below are right in decreeing the suit on the question of title by adverse possession between two adjacent owners? 3. Whether the judgment of the appellate Court is vitiated as it failed to do its duty of final fact finding authority after considering the evidence produced and hence it is perverse?"

2. The first defendant in O.S.No.513 of 1980 on the file of the Principal District Munsif, Padmanabhapuram, is the appellant in the second appeal. The first respondent herein filed the suit for declaration of his title, possession and for injunction. Her case was as follows: She was the owner of 11 ½ cents in R.S.No.476/23, corresponding to old S.No.6466 at Lakshmipuram Village. She got it under the title deed, dt.3.4.1121 M.E. executed by her father. The property was surrounded by well defined old kasalas more than 70 years of age. The property had been in her possession and enjoyment. The defendants were the adjacent owners of S.No.476/17 which was on the western

side of the plaint schedule property. They had no manner of right or possession over the plaint schedule property. The plaint schedule property was more than 4' lower in level than the property of the defendants. As the defendants attempted to encroach upon the suit property, and put up a new boundary, the suit was necessitated. The disputed property had been in the possession of the plaintiff and her ancestors for a long time. Her possession was of right, open and hostile to all others and so even if the defendants or their predecessors-ininterest had any right in the remote past, it had been long lost by adverse possession of the plaintiff from 3.4.1121 M.E.

3. The first defendant alone contested the suit. The other defendants remained ex parte. The plaintiff was not entitled to 11 ½ cents in Old S.No.6466 corresponding to R.S.Nos.476/17 and 476/23. The gift deed, dt.3.4.1121 M.E. for 14 cents was obviously wrong. There were no such separating boundaries as alleged in the plaint. The plaintiff did not rely upon any other source of title to the suit property. Patta was wrongly issued in resurvey for the whole of R.S.No.476/23 by altering the original settlement. The great grandfather of the plaintiff and the first defendant was in enjoyment of the property long prior to the last settlement. He sold a portion of the suit property to his son Vydhianathan, the grand father of the plaintiff, on 8.2 .1068 M.E. describing the portion conveyed as the eastern half of the middle one third of the southern half of Lekkom 134. The Lekkom was wrongly stated. On the same date the said Devasahayam sold the remaining western half to Meyyal and his brothers. After the death of Vydhianathan, his right was inherited by his only son Manuvel, who gave a gift of his property to the plaintiff. The gift deed in favour of the plaintiff was valid and effective only in respect of the eastern one half of old S.No.6466. The first defendant and his brother Pathrose filed a suit O.S.No.139 of 1976 for partition of the western one half against the other sharers, and others who were defendants 2 to 9 in the present suit. The suit was decreed and after the preliminary decree, the first defendant purchased the remaining shares from the sharers. Thus, the first defendant became entitled to the whole of western half of S.No.6466, which now consisted of R.S.No.476/17 and the suit property. Defendants 8 and 9 had no right to any portion of the S.No.6466. The suit was barred by limitation.

4. The trial Court framed three issues and one additional issue: "1. Whether the plaintiff is entitled to a declaration of title and possession as prayed for? 2. Whether the plaintiff is entitled to a permanent injunction prayed for? 3. Reliefs and costs?" Additional issue: "Whether the plaintiff has perfected title by adverse possession?"

5. The learned District Munsif, decided the additional issue first and held that the plaintiff had prescribed for title by adverse possession.

6. On issue No.1, the learned District Munsif held that the plaintiff could claim title only for half of 21 cents as per Ex.A.1 which followed Exs.B.1 and B.2. However, on the finding that the plaintiff had established title by adverse possession and in the resurvey the plaint property having been included in R.S.No.476/1923 and the patta also having been issued to the plaintiff, it held that the plaintiff was entitled to declaration and possession in respect of the plaint property and therefore entitled to a permanent injunction. Consequently, by judgment and decree, dt.17.8.1984 the trial Court granted the prayer of the plaintiff.

7. The first defendant filed appeal in A.S.No.101/1984. The learned Subordinate Judge, Padmanabhapuram, by judgment and decree, dt.28.2 .1999

dismissed the appeal and confirmed the decision of the trial Court. It is, as against this, the present second appeal has been filed.

8. The substantial questions of law have already been set out.

9. The only point for consideration, in my view, is whether the plaintiff has proved adverse possession as claimed by her. For coming to the conclusion that the plaintiff had prescribed for title by adverse possession, the trial Court as well as the lower appellate Court have relied on certain alleged admission on the side of the first defendant in the prior suit, the commissioner's report and plan therein, and the evidence of the same Commissioner in the present suit as P. W.2. In support of her case of adverse possession, the plaintiff has not produced any document whatsoever. She relies on the prior report and plan and the evidence of the Advocate Commissioner, and also the grant of patta in the resettlement proceedings. Ex.A.4 is the true copy of

the proceedings of the Assistant Settlement Officer, Enquiry II, Padmanabhapuram, and it is dated 30.9.1974. The suit is of the year 1980. To show that he had been in possession of the property for over 12 years, the plaintiff should have produced some material, prior to 1974. There is nothing on record on the side of the plaintiff to show her possession prior to 1974. I will come to the prior suit plan and report of the Commissioner as also the evidence of the commissioner presently. In the meantime, let us have a look at the documents produced on the side of the first defendant.

10. Exs.B.2 to B.15 are the land tax receipts covering the period 1 2.9.1956 to 2.8.1975. They clearly show that the first defendant had paid the land tax for 10 ½ cents, which is exactly what is claimed by him as his property. As against these documents, as already noted, no scrap of paper has been produced by the plaintiff to show her possession prior to 1974. The trial Court as well as the appellate Court have relied on Ex.A.8 which is the certified copy of the Commissioner's report and plan in O.S.No.139/1976. In dealing with Ex.A.8, the courts below have made much of the existence of fences in the properties. In the report filed in the prior suit, the age of the fence is not given. Only when the Commissioner was examined in the present suit as P.W.2 on 30.7.1984, he had given the age of the fence as 15 years. The prior suit was in the year 1976. The present suit is 1980. The deposition of the Commissioner to the effect that the fence in the property was 15 years old, has to be taken only with a certain amount of reservation. That cannot by itself show that the plaintiff was in possession of the suit property. In this connection, both the Courts have not properly adverted to the vital admission by the plaintiff's husband in the prior suit which has been marked as Ex.B.16 in the present suit, saying that the plaintiff was in possession of only her half share out of the total extent of 21 cents. This vital admission had been explained away by the trial Court stating that any evidence by the plaintiff's husband would not bind her. This, in my view, is not the correct approach particularly when some right by adverse possession is sought to be conferred on a party. On this vital admission by the plaintiff's husband regarding the possession of the property, we can safely assume that the plaintiff was in possession only of an extent of 10 ½ cents and not 11 ½ cents as claimed by her. As regards the nature of right and necessity to plead right by adverse possession it is well settled that it is exception to the law of acquisition of title through

lawful means and has to be pleaded with certainty and proved to the hilt, and in my considered view, it has not been done by the plaintiff in the present suit. The finding by the Courts below on adverse possession is vitiated by application of wrong tests and based on surmises and assumptions not at all justified. [BUDHWANTI & ANOTHER VS.. GULAB CHAND PRASAD (AIR 1987 SC 1484 = 19 87 (2) SCC 153]. The two Courts have made a patent mistake and I am well within my powers under Section 100 CPC in reappreciating the evidence and coming to my own independent conclusion. [see MADAN LAL VS.. GOPI [AIR 1980 SC 1754].

11. The title has been found by both the Courts in favour of the first defendant/appellant. The Courts below have misapplied the legal principles. They also erred in placing reliance on patta proceedings which would not prove the title of the plaintiff and in any event so far as the present resurvey is concerned, the demarcation in resurvey cannot be put against the first defendant, when there is dispute regarding boundary. The position is well settled by the decision of the Full Bench of this Court in SIVAPRASAD VS.. NARASIMHAMURTHI [AIR 1940 MADRAS 187]. The Madras Survey and Bounaries Act, does not empower the Survey officer, or the appellate authority to decide who was in law entitled to the property under survey. There is no provision in the Act which can be read as operating in such circumstances to prevent A, when B had been registered as the owner of a holding, from instituting a suit in a Court of competent jurisdiction to establish his title as the true owner. K.
SAMPATH, J. 12. This is a case of concurrent mistake by two Courts with regard to adverse possession. Consequently, I hold that the appellant is entitled to succeed. All the substantial questions of law are answered in favour of the appellant. The judgment and the decree, dt.17.8.1 984 of the learned District Munsif, Padmanabhapuram, in O.S.No.513/19 80 as confirmed in A.S.No.101/84 by the learned Subordinate Judge, Padmanbhapuram, on 28.2.1989 are set aside. The Suit O.S.No.513/1980 will stand dismissed. No costs.

6.2.2002 Index:Yes/No pb

To

1. The Subordinate Judge Padmanabhapuram. (with records)

2. The District Munsif, Padmanabhapuram.

3. The Record Keeper, VR Section.

S.A. No.1820/89